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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 COLIN BANCROFT,

11 CASE NO. C17-1312JLR

12 Plaintiff,

13 v.
14 ORDER DENYING PLAINTIFF'S
15 MINNESOTA LIFE INSURANCE
16 COMPANY,
17 Defendant.

18 I. INTRODUCTION

19 Before the court is Plaintiff Colin Bancroft's motion to retax costs in this suit.

20 (Mot. (Dkt. # 74).) Defendant Minnesota Life Insurance Company ("Minnesota Life")

21 opposes the motion. (Resp. (Dkt. # 75).) The court has considered the motion, the

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1 parties' submissions in support of and in opposition to the motion, other relevant portions
 2 of the record, and the applicable law. Being fully advised,¹ the court DENIES the
 3 motion.

4 **II. BACKGROUND**

5 On July 18, 2018, the court denied Mr. Bancroft's motion for partial summary
 6 judgment and granted Minnesota Life's cross-motion for summary judgment on all of
 7 Mr. Bancroft's claims. (SJ Order (Dkt. # 64).) The court entered judgment in favor of
 8 Minnesota Life and dismissed the case with prejudice that same day. (Judg. (Dkt. # 65).)

9 On July 30, 2018, Minnesota Life filed a motion for an award of \$4,586.24 in
 10 costs. (MFC (Dkt. # 67).) Minnesota Life noted its motion for August 10, 2018, which
 11 provided just 11 days of notice to Mr. Bancroft, rather than the 14 days required by the
 12 federal and local rules. (*See id.* at 1); *see Fed. R. Civ. P. 54(d)(1); see also Local Rules*
 13 *W.D. Wash. LCR 54(d).* On August 8, 2018, Mr. Bancroft filed his opposition to
 14 Minnesota Life's motion. (8/8/18 Resp. (Dkt. # 70).) In his opposition, Mr. Bancroft
 15 made all of the arguments he advances in his present motion, including that (1) the
 16 motion was procedurally improper because Minnesota Life noted it incorrectly, (2) Mr.
 17 Bancroft, and not Minnesota Life, was the actual prevailing party, and (3) the relative
 18 financial positions of the party weighed against an award. (*Compare id.* at 1-6, *with Mot.*
 19 *at 1-6.*) In addition, Mr. Bancroft objected to certain specific cost items totaling \$914.86

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21 ¹ No party has requested oral argument (*see Mot. at 1; Resp. at 1*), and the court considers
 22 oral argument to be unnecessary to its disposition of the motion, *see Local Rules W.D. Wash.*
LCR 7(b)(4).

1 of the costs that Minnesota Life requested. (*See* 8/8/18 Resp. at 6-7.) Minnesota Life did
 2 not file a reply. (*See generally* Dkt.)

3 The court referred Minnesota Life's motion to the Clerk. (*See* 7/31/18 Dkt.
 4 Entry.) On August 24, 2018, the Clerk granted Minnesota Life's motion in part but
 5 disallowed the \$914.84 in costs to which Mr. Bancroft raised specific objections.
 6 (8/24/18 Order (Dkt. # 73).) In total, the Clerk awarded \$3,671.40 in costs to Minnesota
 7 Life. (*Id.* at 1.) The Clerk also stated that he "had no discretion but to allow costs to the
 8 prevailing party," and that the "relative financial positions of the parties [could not] be
 9 taken into consideration by the [C]lerk." (*Id.* at 2.)

10 On August 31, 2018, Mr. Bancroft filed the present motion to retax costs. (*See*
 11 Mot.) He asks the court to "modify the [C]lerk's taxation of costs and deny [Minnesota
 12 Life's] request for costs." (*Id.* at 1.) Minnesota Life opposes the motion. (*See* Resp.)
 13 The court now considers Mr. Bancroft's motion.

14 **III. ANALYSIS**

15 Federal Rule of Civil Procedure 54(d)(1) provides in pertinent part: "Unless a
 16 federal statute, these rules, or a court order provides otherwise, costs—other than
 17 attorney's fees—should be allowed to the prevailing party." Fed. R. Civ. P. 54(d)(1). As
 18 a general matter, Rule 54(d) creates a strong presumption in favor of awarding costs to
 19 the prevailing party. *Miles v. State of Cal.*, 320 F.3d 986, 988 (9th Cir. 2003). This
 20 presumption is so strong that a court "need not give affirmative reasons for awarding
 21 costs" to the prevailing party in rendering its decision on a motion to retax. *Save Our
 22 Valley v. Sound Transit*, 335 F.3d 932, 945 (9th Cir. 2003). "To overcome this strong

1 presumption in favor of awarding costs to the prevailing party, the losing party must
 2 convince the court that the case on which the [motion for costs] rests is ‘not ordinary,’ or,
 3 in other words, that it would not be equitable for the losing party to bear the costs.”

4 *Camfield v. Bd. of Trs. of Redondo Beach Unified Sch. Dist.*, No.

5 216CV02367ODWFFM, 2018 WL 910459, at *2 (C.D. Cal. Feb. 14, 2018) (quoting

6 *Ass’n of Mexican-Am. Educators v. State of Cal.*, 231 F.3d 572, 592–93 (9th Cir. 2000)).

7 Mr. Bancroft makes three arguments in support of his motion. First, he argues that
 8 the court should deny an award of costs to Minnesota Life because Minnesota Life
 9 improperly noted its motion with only 11 days of notice to Mr. Bancroft rather than the
 10 required 14. (Mot. at 2-3.) Next, he argues that an award of costs is unwarranted
 11 because he—not Minnesota Life—was the actual prevailing party. (*Id.* at 3-6.) Finally,
 12 he argues that the court should refrain from awarding costs due to the financial disparity
 13 between the parties. (*Id.* at 6.) The court addresses each argument in turn.

14 **A. Insufficient Notice**

15 There is no dispute that Minnesota Life made an error in noting its motion with
 16 only 11 days’ notice. (*See* Resp. at 1.) Rule 54(d)(1) provides that “[t]he clerk may tax
 17 costs on 14 days’ notice.” Fed. R. Civ. P. 54(d)(1). Accordingly, Minnesota Life should
 18 have noted its motion for three Fridays after filing rather than only two. *See* Local Rules
 19 W.D. Wash. LCR 54(d)(3) (“The motion for costs shall be noted for consideration
 20 pursuant to LCR 7(d)(3).”); *see also id.* LCR 7(d)(3) (stating that, with certain exceptions
 21 that do not include motions to tax costs, “all other motions shall be noted for
 22 consideration on a date no earlier than the third Friday after filing and service of the

1 motion.”). Minnesota Life’s noting error, however, provides no basis for overturning the
 2 Clerk’s decision to tax costs against Mr. Bancroft.

3 Mr. Bancroft demonstrates no prejudice from Minnesota Life’s error which
 4 shorted him three (3) days in responding to Minnesota Life’s motion. Indeed, there is no
 5 argument that he asserts now that he failed to assert in response to Minnesota Life’s
 6 motion. (*Compare Mot., with 8/8/18 Resp.*) Further, the Clerk granted all of the specific
 7 cost reductions he requested. (*See 8/24/18 Order* (reducing Minnesota Life’s award of
 8 costs from \$4,586.24 to \$3,671.40).)

9 With respect to Mr. Bancroft’s other arguments, the Clerk stated that he had “no
 10 discretion but to allow costs to the prevailing party”—meaning Minnesota Life—and that
 11 he could not take into consideration “[t]he relative financial positions of the parties.”
 12 (8/24/18 Order at 2.) Although the Clerk may have been unable to consider all of Mr.
 13 Bancroft’s arguments, this court can. Indeed, Mr. Bancroft now has had a full
 14 opportunity to present all of his arguments to the court—by filing his present motion and
 15 reply memorandum. (*See generally Mot.; Reply (Dkt. # 76).*) Accordingly, the court
 16 cannot conclude that Mr. Bancroft was prejudiced by Minnesota Life’s noting error and
 17 so declines to overturn the Clerk’s award on that basis.² *See, e.g., Bates v. State Farm*

18 2 The cases upon which Mr. Bancroft relies are distinguishable. Most involve motions
 19 for an award of costs that were filed too late, rather than noted for consideration too early. *See*
Mercado v. HRC Collection Ctr., No. 3:12-CV-122-J-32JBT, 2013 WL 6085221, at *1 (M.D.
 20 Fla. Nov. 19, 2013) (denying the defendants’ motion for costs because they “filed their Motion
 21 for Costs . . . six weeks after entry of the Judgment”); *Lagarde v. Metz*, No. CV 13-805-RLB,
 2017 WL 2371817, at *4 (M.D. La. May 31, 2017) (denying a motion for costs because the
 22 plaintiff “did not seek costs until almost a month after the . . . deadline,” “failed to follow the
 correct procedures,” and failed to show “excusable neglect”); *Lytle v. Carl*, 382 F.3d 978, 989
 (9th Cir. 2004) (affirming the district court’s refusal “to award the remaining taxable costs”)

1 | *Mut. Auto. Ins. Co.*, No. C14-1557JLR, 2015 WL 11714360, at *2 (W.D. Wash. Oct. 19,
 2 | 2015) (denying the defendant’s motion to strike the plaintiff’s late response because the
 3 | defendant “suffered only minimal prejudice by losing two [out of four] days of its time to
 4 | prepare a reply memorandum”).

5 | **B. The Prevailing Party**

6 Mr. Bancroft also argues that the court should not award Minnesota Life any costs
 7 | because he, and not Minnesota Life, was the true prevailing party in this litigation. (*See*
 8 | Mot. at 3-6.) In November 2017, more than three months after Mr. Bancroft filed suit,
 9 | Minnesota Life determined that Mr. Bancroft met the policy criteria and paid him
 10 | \$384,000.00. Mr. Bancroft argues that Minnesota Life paid him the insurance proceeds
 11 | as a result of his lawsuit, and thus he is effectively the prevailing party. (*Id.* at 3.) In
 12 | support of his argument, Mr. Bancroft relies on precedent arising under *Olympic*
 13 | *Steamship Co. v. Centennial Insurance Co.*, 811 P.2d 673 (Wash. 1991). (*See* Mot. at
 14 | 4-5.) In that case, the Washington Supreme Court held “that an award of fees is required
 15 | in any legal action where the insurer compels the insured to assume the burden of legal
 16 | action, to obtain the full benefit of his insurance contract” *Olympic Steamship*, 811
 17 | P.2d at 681.

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 21 | because counsel “failed to timely file a bill of costs as required” by the local rules). When a
 22 | motion is filed untimely, there is no way to fully correct the error. Here, however, Mr. Bancroft
 22 | could have apprised the court that he was entitled to three additional days’ notice prior to
 22 | responding to Minnesota Life’s motion, but he did not. Further, as noted above, he now has had
 22 | a full opportunity to articulate his arguments to the court. Thus, the court does not find the cases
 22 | upon which Mr. Bancroft relies persuasive.

1 Even assuming that precedent related to *Olympic Steamship* is applicable to an
 2 award of costs under Rule 54(d)(1),³ the court cannot conclude that Minnesota Life made
 3 the insurance proceeds payment to Mr. Bancroft as a result of the litigation. Indeed, in its
 4 order granting Minnesota Life's motion for summary judgment, the court stated:

5 Due to the passage of nearly five additional months since her original opinion
 6 in early June 2017, her acceptance of Dr. Cowan's October 2017 statement
 7 "that individuals with similar factors as Mr. Bancroft" had a (non-biologic)
 8 MIPI prognosis of 29 months, her inference that the "marked" improvement
 9 anticipated by Dr. Cowan had not occurred, and the fact that Mr. Bancroft
 10 may have taken a turn for the worse or there may have been negative
 11 developments in Mr. Bancroft's treatment, Dr. [Shapland] used the 29-month
 12 median survival (non-biologic MIPI) and determined based on a 90%
 13 certainty standard that as of November 1, 2017, Mr. Bancroft's life
 14 expectancy was 24 months or less. (5/7/18 Shapland Decl. ¶ 9; Shapland
 15 Dep. at 108:3-122:6.) Minnesota Life paid Mr. Bancroft \$384,000.00 the
 16 next day. (Plf. 2d MSJ at 12; Def. MSJ at 10.)

17 (SJ Order (Dkt. # 64) at 15.) Thus, Minnesota Life's payment of insurance proceeds to
 18 Mr. Bancroft was the result of a reevaluation of Mr. Bancroft's life expectancy on
 19 November 1, 2017; not the instigation of litigation by Mr. Bancroft. Further, the court
 20 expressly denied Mr. Bancroft's claim that Minnesota Life had breached the policy by
 21 provisionally denying his claim on June 8, 2017. (*See id.* at 24-32.) Thus, the record
 22 does not support Mr. Bancroft's contention that Minnesota Life paid benefits to him as a
 result of his lawsuit. Instead, undisputed facts in the record indicate that Minnesota Life
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20 ³ An award of attorney's fees under *Olympic Steamship* represents an "equitable
 21 exception to the American rule," under which "a court has no power to award attorneys' fees . . .
 22 in the absence of contract, statute, or recognized ground of equity." *Jaco Env'l, Inc. v. Am. Int'l
 Specialty Lines Ins. Co.*, No. 2:09-cv-0145 JLR, 2009 WL 1591340, at *10 (W.D. Wash. May
 19, 2009). In contrast, Rule 54(d) creates a strong presumption in favor of awarding costs to the
 prevailing party. *See Miles*, 320 F.3d at 988.

1 eventually paid him the insurance proceeds because, by November 1, 2017, he met the
 2 criteria required under the insurance policy.⁴

3 Minnesota Life prevailed on every aspect of its cross-motion for summary
 4 judgment and in opposing Mr. Bancroft's summary judgment motion. (*See generally* SJ
 5 Order.) The court concludes, therefore, that Minnesota Life was the "prevailing party"
 6 for purposes of an award of costs under Rule 54(d)(1).

7 **C. Disparate Financial Positions**

8 Finally, Mr. Bancroft asserts that the relative financial positions of the parties
 9 weigh in favor of denying an award of costs. (Mot. at 6.) The Ninth Circuit has held that
 10 "[c]osts are properly denied when a plaintiff 'would be rendered indigent should she be
 11 forced to pay' the amount assessed." *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d
 12 1236, 1248 (9th Cir. 2014) (quoting *Stanley v. Univ. of S. Cal.*, 178 F.3d 1069, 1080 (9th
 13 Cir. 1999)). The burden is on Mr. Bancroft to prove his limited financial resources. *See*
 14 *Camfield v. Bd. of Trs. of Redondo Beach Unified Sch. Dist.*, No.
 15 216CV02367ODWFFM, 2018 WL 910459, at *3 (C.D. Cal. Feb. 14, 2018) (citing *Mam*
 16 *v. City of Fullerton*, No. SACV111242JLSMLGX, 2014 WL 12573550, at *1 (C.D. Cal.
 17 July 24, 2014) ("The losing party has the burden of showing why costs should not be
 18 awarded.")); *see also Rossi v. City of Chicago*, 790 F.3d 729, 738 (7th Cir. 2015) ("The

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 21 ⁴ This case is, therefore, unlike *Jaco Environmental, Inc.*, 2009 WL 1591340, at *10, in
 22 which the insurance company did not admit its obligation to defend the insured "dating back to
 the initiation of the [underlying] suit" until after the insured had filed its coverage lawsuit. (*See*
 Mot. at 4 (relying upon *Jaco*).) In contrast, here, the court concluded that Minnesota Life did not
 breach its insurance contract by provisionally denying Mr. Bancroft benefits on June 8, 2017,
 which precipitated his suit. (*See* SJ Order at 24-32.)

1 burden of proving financial hardship falls on the objecting party, who must provide the
 2 court with sufficient documentation such as affidavits, statements of assets and income,
 3 and a schedule of expenses.”).

4 In his motion, Mr. Bancroft states that he is “medically retired.” (Mot. at 6 (citing
 5 Bancroft Dep. (Dkt. # 40-1) at 4).) He also asserts that he has “minimal” retirement
 6 assets and other savings and property. (*Id.* (citing Bancroft Dep. at 33-36).) In his
 7 deposition, he states that, after paying off his debts, he has approximately \$75,000.00 left
 8 of the \$384,000.00 that Minnesota Life paid him on November 1, 2017. (*See* Bancroft
 9 Dep. at 33-36.) This evidence is insufficient for the court to conclude that Mr. Bancroft
 10 would “be rendered indigent” should the court require him to pay \$3,671.40 in costs.

11 *See Escriba*, 743 F.3d at 1248 (quoting *Stanley*, 178 F.3d at 1080).

12 Indeed, the \$3,671.40 award is relatively small. *Compare Save Our Valley*, 335
 13 F.3d at 946 (upholding the “relatively small sum” of \$5,310.55), *with Stanley v. Univ. of*
 14 *S. Cal.*, 178 F.3d 1069, 1080 (9th Cir. 1999) (reversing and remanding the district court’s
 15 denial of a motion to re-tax costs of \$46,710.97, which had been awarded against an
 16 unemployed civil rights plaintiff), *and Ass’n of Mexican-Am. Educators*, 231 F.3d at 593
 17 (holding that the district court did not abuse its discretion by refusing to award
 18 “overwhelming” and “extraordinarily high” costs of \$216,443.67 against plaintiffs whose
 19 “resources are limited”). This case simply does not present “the rare occasion where
 20 severe injustice will result from an award of costs.” *See Save Our Valley*, 335 F.3d at
 21 945. The court cannot conclude that Minnesota Life’s costs are so high—nor that Mr.
 22 Bancroft’s means so limited—to overcome the strong presumption in favor of awarding

1 costs. *See Camfield*, 2018 WL 910459, at *4. Accordingly, the court denies Mr.
2 Bancroft's motion to retax costs.

3 **IV. CONCLUSION**

4 Based on the foregoing analysis, the court DENIES Mr. Bancroft's motion to retax
5 costs (Dkt # 74) and upholds the Clerk's decision to tax costs of \$3,671.40 against Mr.
6 Bancroft and in favor of Minnesota Life (Dkt. # 73).

7 Dated this 26th day of October, 2018.

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10 JAMES L. ROBART
11 United States District Judge
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